

Main Street Terrace Care Center and Mary Catherine Craig. Case 9–CA–35620

January 29, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

On September 16, 1998, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions, and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Main Street Terrace Care Center, Lancaster, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Patricia Fry, Esq., for the General Counsel.

Geoffrey E. Webster, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge: Upon a charge filed in this case by Mary C. Craig (the Charging Party) on January 5, 1998, as amended on April 3, 1998, a complaint was issued on April 3, 1998, alleging that Main Street Terrace Care Center (the Respondent) violated Section 8(a)(1) of the Na-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Member Hurtgen agrees with the conclusion that the Respondent's discharge of employee Craig violated Sec. 8(a)(1) of the Act. However, he is concerned about possible implications of the judge's decision. In this regard, the judge specifically noted (1) the Respondent's "at will" employment policy and (2) the fact that the Respondent told Craig that it was not required to have a reason for the discharge. Member Hurtgen wishes to make it clear that a prima facie case is not supported by a refusal to supply a contemporaneous justification for a discharge. Rather, Member Hurtgen agrees that the prima facie case is supported by other facts found by the judge. A failure to supply a contemporaneous justification for a discharge is a factor to be considered in determining whether there has been a rebuttal of the prima facie case.

Since the administrative law judge does not rely on the existence of an "at will" employment policy or the refusal to supply a contemporaneous justification for a discharge in establishing the prima facie case, Chairman Truesdale and Member Fox find it unnecessary to address Member Hurtgen's comments concerning the reliance on such factors.

tional Labor Relations Act (the Act), by discharging Mary Craig because she engaged in specified concerted activities and by orally promulgating a rule prohibiting employees from discussing their wages among themselves. Respondent denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the operation of a nursing home for the elderly at Lancaster, Ohio. The complaint alleges, the Respondent admits, and I find that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Facts

Mary Craig was hired by Respondent through Margie Keister, its then dietary manager, in June 1996 as a dietary aide. Shortly after she began working, Mary Craig was promoted to cook, which involved a pay raise. When she was hired, Mary Craig was told by Margie Keister not to tell anyone how much she was making because it would cause hard feelings, and the management did not want it known that some of the employees were paid more than others even though they did the same job.

Sometime after she became a cook at Respondent's facility she received a writeup from Keister for burning chili one time.

In January 1997 Respondent hired Mary Ann Jeffers as a dietary manager when Keister became a dietary aide. It was Jeffers' first supervisory position. Jeffers testified that Respondent has three or four dietary aides¹; that Respondent also employs cooks²; that she makes up the employee schedules for the dietary departments³; that she works from 7 a.m. to 3 p.m.; that the kitchen is located on the first floor and her office is located in the basement; that she spends from 4 hours to all day in her office depending on the demands on her time; that she is responsible for telling employees if they are getting raises or if their pay is being changed, and she tells employees to keep their changed pay confidential and not discuss it with other employees; and that she told employees that the owner of the facility did not want everyone talking about how much money other people were making.

April Craig, Mary Craig's daughter, was hired by Respondent in March 1997 as a dietary aide. April Craig testified that when Jeffers hired her Jeffers told her that she was not allowed to discuss her paycheck with anyone.

In October 1997 Jeffers gave Mary Craig an annual evaluation, General Counsel's Exhibit 5. The evaluation is dated "7-14-97." Mary Craig was supposed to receive the evaluation in the summer at about the time of her anniversary date but Jeffers apparently had not been able to write it up at that time. The evaluation shows that of the seven categories involved on the

¹ Their job description was received as G. C. Exh. 2.

² Their job description was received as G. C. Exh. 3.

³ See for example G.C. Exh. 4.

form, Mary Craig received four outstandings and three above average ratings; that her overall point rating placed her in the outstanding category; that she received an outstanding in the category "PERSONALITY"⁴; and that Jeffers wrote on Mary Craig's evaluation form the following: "Mary is a very good employee. She is very dependable, very cooperative and a very hard worker!"⁵

In October 1997 Mary Craig received employee of the month, General Counsel's Exhibit 6. Jeffers testified that all of the employees at the facility vote for the employee that they want to be the employee of the month; that the employees are given a blank piece of paper when they vote; and that the employee chosen receives a certificate, money, and has their name placed on a plaque at the facility.

With respect to Mary Craig becoming involved in trying to get other employees' problems corrected, Jeffers testified that Mary Craig came to her more than once about getting her daughter, April Craig's, paychecks corrected; and that Mary Craig indicated that she was going to help her daughter get unemployment. Mary Craig testified that she spoke to Jeffers about her daughter's paycheck several times; that she also spoke to Tracy Wentz, an administrative assistant who is in charge of payroll, about April Craig's paycheck; that one of the problems with April Craig's paycheck was that she would work a double shift and either not get paid overtime for the second shift or not get paid for the second shift at all; that in the spring of 1997 employee Joyce Rigby complained to her that Respondent's administrator, Lisa Cochran, cut her pay in that, unlike April Craig, Rigby, after the change, received only one rate whether she worked as a dietary aide or a cook; that she spoke to Jeffers about the Rigby situation and subsequently the situation was corrected to Rigby's satisfaction; that in September 1997 Jeffers told her and Tracy Jackson, the morning cook,⁶ that they would be getting a raise but they should not say anything to the other employees in the kitchen because they were not getting the raise; that later they asked Jeffers how much the raise would be and Jeffers told them it was going to be about 50 cents; that she received a raise of 25 cents and when she asked Jackson, who had worked at Respondent longer than she did, how much she received, Jackson said that she did not get any raise; that she saw the raise on her paycheck in November 1997; that between September 1997 and when she received the raise in November 1997 she discussed the fact with Jackson that they did not receive the promised raise; that before she received the raise Jeffers asked her what was the matter with Jackson and she told Jeffers that she, Jeffers, promised a raise, they did not get it and Jackson was mad about it; and that Jeffers left the room and returned later and indicated that it was the mistake of the payroll clerk. Rigby testified that when she started at Respondent she was getting two pay rates, namely, one for when she was a cook and one for when she was a dietary aide; that subsequently her pay was cut back so that she was receiving one rate, which was lower than the rate she previously received when she worked as a cook; that she was upset with the change and she spoke to Jeffers about it; that she spoke to Mary Craig about the change and Mary Craig offered to

speak to Jeffers about it for her; and that it was her understanding that Mary Craig told Jeffers that it was not right to change Rigby's pay. April Craig testified that when she noticed that Respondent was not paying her for overtime when she worked double shifts she had her mother speak to Tracy, who is the payroll clerk, and sometimes the situation was corrected; that a few times she went with her mother; that Jeffers told her that she needed to come to her by herself; that she overheard Jackson and her mother talk about the problem they were having with a raise, namely, that they were supposed to get a raise and they did not; and that she overheard her mother and Jackson ask Jeffers when they were going to get the raise and Jeffers said that she would have to speak with Cochran. On cross-examination April Craig testified that the conversation between Jeffers and her mother and Jackson about their raise took place in the kitchen where all the other dietary aides were working; and that she had no trouble hearing the conversation. On redirect April Craig testified that her mother went to speak to Jeffers and Tracy more than she, April, went alone to try to get the situation straightened out. General Counsel's Exhibit 13 shows corrections to April Craig's pay. And General Counsel's Exhibits 14 and 15 cover Mary Craig's above-described pay raise.

Regarding Respondent's employee handbook, General Counsel's Exhibit 8, Jeffers testified that the last four pages of the handbook deal with written warnings, suspensions, and terminations.

In November 1997 Mary Craig, along with Jeffers and the other employees in the dietary department, attended a meeting in Lisa Cochran's office. Cochran, as the administrator of the involved facility, oversees the day-to-day operations of the facility, supervises all the department heads and directs all employees.⁷ At the meeting, Cochran indicated that Jeffers did not know how to handle the situation in the kitchen, namely, that people could not get along. Mary Craig testified that Cochran said that she was going to see if she could help; that Cochran told those present that she wanted to have everything out on the table, and she wanted those present to say exactly what they thought so that she could get things ironed out; that when she was asked to give her opinion as to what the problems were she said that here only problem was with Bob Monson, an employee who worked in the kitchen, in that he was rude to the nurses aides, expected her to do his work even though the involved job was not part of her job description, and, made snide remarks about her; that Monson said she was lying; that she then indicated that she would only discuss business matters with Monson⁸; that Cochran then asked her why she could not get along with everyone; that she got along with everyone except Monson; that Cochran then said "[i]f you can't get along

⁴ According to the form this includes "Appearance, Courtesy, Friendliness and Expression" And the outstanding rating in this category stands for "Consistently Inspires Confidence."

⁵ Jeffers also checked off the box for recommend continued employment.

⁶ Mary Craig was the afternoon cook.

⁷ She has been the administrator of the facility since March 1997. Before that she was the regional administrator for the parent company of Respondent. Cochran testified that neither Respondent nor its parent organization, to her knowledge, ever adopted a rule prohibiting employees from discussing their wages amongst themselves, she has never adopted such a rule and Jeffers does not have the authority to adopt such a rule for the Company; that neither April Craig, Rigby nor Jackson were ever disciplined or admonished for speaking to Mary Craig about their compensation; and that no employees have ever been disciplined or admonished for speaking to any other employee about their compensation.

⁸ Mary Craig testified that Jeffers did try to assign work schedules such that she and Monson would not work together any more than necessary.

with anybody, why are you here” and she said “[a]fter all I’ve done for this place” and she got up and walked out saying “end of meeting”; that she was concerned about the time because she had to prepare dinner or the meal was going to be late; that after the meeting no one from management said anything to her about getting along with Monson or about her attitude; and that no one told her that she was not doing her job correctly after this meeting. Rigby testified that she had problems with Monson; that Monson talked about people behind their backs; that Monson had trouble getting his work done as quickly as some of the other people; and that Monson did not get as much work done as the other dietary aides. April Craig testified that Monson was rude with people and when the nurses aides asked him to get something he would tell them whenever he had time; that Monson got rude with her one time; that at the beginning of this meeting Cochran told the employees to say exactly what they thought because if they did not the tension in the kitchen would never get resolved; that none of the employees volunteered so Cochran asked each of the employees and they said that they did not have any problems; that when Cochran asked Mary Craig she said that she and Monson did not get along because he was rude and he would talk back; and that when her mother finished talking she got up and walked out of the room. On cross-examination April Craig testified that it was her understanding that an employee should remain in this meeting until Cochran called the meeting to an end; that her mother was loud at this meeting when she was talking about her and Monson not getting along; that her mother said that she and Monson would not talk unless it pertained to the job; and that she complained to Jeffers about Monson more than once. Cochran testified that this was the first such meeting she held since she came back to the facility as the administrator; that after the meeting she did not issue any reprimands to Monson or discuss with him getting along with other employees; and that she discussed Monson with Jeffers but she did not know if Jeffers ever discussed it with Monson and she was not aware that Jeffers ever put anything in writing to Monson.

On December 10, 1997, April Craig came home and told her mother, who was not working that day, that she had quit her job at Respondent because another employee, Gladys Kelly, had been making snide remarks about her.⁹ Mary Craig testified that April asked her to retrieve her cigarette case, which contained money, from Respondent’s facility where she had mistakenly left it; that she went with her husband to Respondent’s facility to retrieve the cigarette case that evening; that as she entered Respondent’s facility through the back entrance where employees normally enter, she overheard Monson telling Jeffers that April Craig was lying on him and April had not been bringing up her supplies, and Jeffers agreed with him; that she asked Jeffers how she could say those things knowing that they were not true, and she told Jeffers that she had fallen in the kitchen and she could not locate the papers she needed to fill out; that she told Jeffers that she was not being fair to her; that Jeffers said that she was going to fire or get rid of whoever was making trouble in the kitchen; that she said, “Mary you don’t have any reason to fire me”; that she told Jeffers that she better have a good reason for firing her because somebody could be sued if there was not a good reason; that she told Jeffers that she would sue her too; that at that point her husband started

honking the horn and while Jeffers hollered “[c]ome back here” she told Jeffers that she had to go; and that she worked for 2 or 3 days after this conversation. On cross-examination Mary Craig testified that there was a note in the communications book which the dietary employees and Jeffers used to communicate dated December 10, 1997; and that the note referred to the inability of the dietary employees to work together.

On December 11, 1997, a nurse came into the kitchen. Mary Craig testified that she could only remember the nurse’s first name, Paula; that the nurse was crying and her face was swollen; that she asked the nurse what was wrong and the nurse said that she had been passed over for a job that she should have received; that she told Paula, in Monson’s presence, that she should file a grievance against the director of nursing; that no one from management said anything to her about this conversation; that on another occasion while she was wiping off tables in the dining room a nursing aide was griping about the way she was being treated and said “if we had a union”; and that at this point she said to the nurses aide “[i]f we had a union they would not treat any of us this way” loud enough for the nurses at their station to hear, and the nursing director was standing at the station at the time; and that no one said anything to her about her statement. On cross-examination Mary Craig testified that the nurse’s name was Donna McKenzie; and that she did not go to anyone in administration about McKenzie’s problem but she did make her statement loud enough so that the director of nursing would hear her.

On December 15, 1997, Mary Craig was terminated. Jeffers testified that she was present when this occurred and that Mary Craig was not given a reason for being terminated. Mary Craig testified that she came to the Respondent’s facility to tell Jeffers that she was sick; that when she told Jeffers that she had the flu Jeffers asked her to accompany her to Cochran’s office; and that Cochran terminated her and Cochran refused to tell her why, saying, “I don’t have to tell you, I don’t have to have a reason.” On cross-examination Mary Craig testified that she received and read the employee manual when she was hired; that the manual indicates that Respondent has the right to terminate any employee at any time for any reason with or without notice; and that when she was fired Cochran said that there was no reason. Cochran testified that under Respondent’s personnel policies she only states that she is terminating without cause and that is the end of the discussion that she is supposed to have; that Jeffers told her on December 15 or 14 that she wanted to fire Mary Craig; that she does not work on Sunday so Jeffers would have spoken to her on Monday December 15, 1997; that she did not conduct an independent investigation but rather relied solely on Jeffers; that she was aware that Respondent had not given any final warning to Mary Craig; that she was aware that Mary Craig had not been given any written reprimand; that MaryCraig had not been given any kind of documentation to show that anything that she was doing was unsatisfactory; that Mary Craig had not been given any written notice that her performance or anything had continued to be unsatisfactory or had been unsatisfactory since that meeting in Cochran’s office; and that Mary Craig had not been given any warning at all. When called by Respondent as a witness Cochran testified that she did not become aware of Mary Craig’s complaints to supervisors about employees’ pay, hours, etc. until after Mary Craig had been terminated; that neither Respondent nor its parent company require that a termination notice be placed in the employee’s file; and that Respondent

⁹ April Craig had given Respondent 1-month notice and she had planned to quit about December 13, 1997.

does not have any standards with respect to termination without cause. Subsequently Cochran testified that the action she took on December 15, 1997, with respect to Mary Craig was based solely¹⁰ on Jeffers' recommendation and what she was told by Jeffers, namely,

[t]hat Mary Craig was not getting along with her coworker and that there . . . were several disruptions within the workplace, such as crying . . . loud voice, talking very loudly or shouting . . . banging pots and pans around . . . and that was disruptive to the workplace and to the home itself, being where the kitchen and serving area are located.

Mary Craig testified that she did not cry a lot at work but that on one occasion in October or November 1997 when she lost her husband's \$300 eyeglasses she cried while at work and she talked to Jeffers about it.

With respect to banging pots and pans, Mary Craig testified that the pots and pans were put away wet and apparently placed inside one and another, and as they dried there was suction and they were really hard to get apart. Consequently, when she pulled hard to get them apart "the pans flew."

On rebuttal Mary Craig testified that the only time she banged pots and pans in the kitchen between the November 1997 meeting in Cochran's office and December 15, 1997, was when she could not get them apart; that the pots and pans were placed inside one another and they formed a vacuum or suction and she had to pry them apart and one time a nurse named Annie came in to make sure that she did not fall since she heard the pans bang; that she did not routinely bang pans around like that; that she did not shout frequently in the kitchen; that she talks loud but she did not talk any louder than she did in September 1997 before she received her outstanding evaluation; and that the only thing that she did during the period after the meeting in Cochran's office and when she was terminated that she did not do in September before she received the outstanding evaluation was to mention the word "grievance" and to say what she felt about the union.

With respect to employees who had been terminated in the 2 years preceding the hearing herein, Cochran testified that she discharged two employees for cause, Abby Caldwell and Mary Craig; that on the payroll form for Caldwell her assistant wrote "Terminated without cause"; that Respondent's policy states termination without cause and she personally terminated Caldwell without cause; that she had a reason for terminating Caldwell, namely, attitude; that she had several complaints from family members and coworkers that Caldwell was rude and there were some charting and documentation issues also; that there are written reprimands in Caldwell's file; that Mary Craig was terminated without cause; that she had reasons to terminate Mary Craig, namely, an unwillingness to get along with her coworker and disrupting the work atmosphere; that there are no reprimands in Mary Craig's file; and that Ruth Knokle was a cook in the dietary department who was terminated by Respondent, and she had a reprimand in her personnel file.

¹⁰ Cochran subsequently testified that other staff members occasionally asked her what was going on in the kitchen but they never specifically mentioned Mary Craig but Jeffers told her what was going on. Cochran conceded that the affidavit she gave to the National Labor Relations Board (the Board) says nothing about other employees saying that there were disruptions in the kitchen.

Analysis

Paragraph 4 of the complaint alleges that since about July 5, 1997, and thereafter, Respondent has promulgated a rule prohibiting employees from discussing their wages among themselves, and that such rule was promulgated to discourage employees from engaging in concerted activities. On brief, counsel for the General Counsel points out that the Board has long held that an employer violates Section 8(a)(1) of the Act when a supervisor directs employees that they are not permitted to discuss their pay or wages among themselves, *Automatic Screw Products Co.*, 306 NLRB 1072 (1992), and *Independent Stations Co.*, 284 NLRB 394, 396 (1987). Respondent, on brief, argues that there is and was no such orally promulgated rule prohibiting employees from discussing wages amongst themselves and thus no proof of such a rule; that if anything, such a rule (if in existence) was more honored in the breach than in enforcement; and that none of the employees who discussed their wages with other employees were disciplined. Mary Craig's testimony regarding what Keister told her when she was hired about the prohibition regarding discussing her wages with other employees is credited. Keister worked for Respondent at the time of the hearing herein. Keister did not testify and deny that she made this statement to Mary Craig. Jeffers admitted that as dietary manager she told employees that the owner did not want everyone talking about how much money other people were making. And Jeffers did not deny April Craig's testimony that Jeffers told her that she was not allowed to discuss her paycheck with anyone. April Craig's testimony is credited. Two different dietary managers told employees about this rule. As the Board pointed out in *Automatic Screw Products Co.*, supra, the discussion by employees of their salaries or wages is an inherently concerted activity clearly protected by Section 7 of the Act. And as pointed out in *Independent Stations Co.*, supra, the mere existence of the rule inhibiting protected conduct, even if not enforced, constitutes an unlawful interference in violation of Section 8(a)(1) of the Act. By promulgating such rule and advising employees of such rule Respondent violated Section 8(a)(1) of the Act.

Paragraph 6 of the complaint alleges that on December 15, 1997, Respondent discharged its employee Mary Craig because she engaged in the concerted activities described above and to discourage employees from engaging in these activities. On brief, counsel for the General Counsel contends that a violation of the Act will be found if the employee engaged in protected concerted activity, Respondent was aware of the nature of the activity and the decision to discharge was motivated by the protected concerted activity, *Independent Stations*, supra at 405, citing *Meyers Industries*, 268 NLRB 493 (1984); that after the General Counsel has established unlawful motivation, the burden shifts to the respondent to demonstrate that it would have engaged in the same action in the absence of the protected conduct, *Rogers Environmental Contracting*, 325 NLRB 144 (1997), citing *Wright Line*, 251 NLRB 1083 (1980); that the action undertaken by Mary Craig as the representative of the other employees, in taking their problems to management, is clearly protected, *El Gran Combo*, 853 F.2d 996 (1st Cir. 1988); that Mary Craig's statements at the meeting in Cochran's office when she complained about Monson were an outgrowth of concerns shared by other employees including Rigby and April Craig and as such Mary Craig's statements were protected concerted activity, *Salisbury Hotel*, 283 NLRB 685 (1987); that Mary Craig's statements to Jeffers on December 10

about obtaining unemployment insurance for April Craig is protected activity, *S & R Sundries, Inc.*, 272 NLRB 1352 (1984); that Mary Craig's statement to Donna McKenzie on December 11, 1997, is protected activity, *Parkway Manor-Village Inn*, 299 NLRB 574, 575 (1990); that the director of nursing did not deny that he heard Mary Craig's statement to McKenzie; that Mary Craig's actions with respect to (a) the delay in the raise promised to her and Jackson, and (b) the mistakes in April Craig's pay were concerted in nature since they related to conditions of employment that are matters of mutual concern, *Salisbury Hotel, Inc.*, supra, citing *Meyers Industries*, 281 NLRB 882 (1986); that Respondent's resentment of Mary Craig's concerted protected activity was demonstrated by Jeffers' telling April Craig to handle her own complaints and not involve her mother; that Respondent did not show that Mary Craig engaged in misconduct which would warrant termination; that Respondent did not explain its failure to follow its progressive discipline system described in its employee handbook; and that the conclusion that Mary Craig was fired in retaliation for her protected concerted activity is abundantly supported by the record. Respondent, on brief, argues that Mary Craig's walking out of the November 1997 meeting in Cochran's office was grounds for immediate suspension of employment. Respondent also takes the following position at page 5 of its brief:

On December 10, Craig told Mary Jeffers she did not think Mary was treating her fairly and Mary disagreed with her (Tr. 62). Mary Jeffers allegedly stated that she was going to fire the entire kitchen staff because of all the trouble occurring in the kitchen (Tr. 62). Craig threatened Mary Jeffers with a personal lawsuit (Tr. 62, 63). When Craig's supervisor, Mary Jeffers, insisted on her discussing her threats, she refused and left the facility (Tr. 63). The next time Craig reported for work she was escorted to the Administrator's office and her employment was terminated (Tr. 65).

And Respondent concludes by asserting that Respondent was not required to offer a reason for termination of Mary Craig; and that Mary Craig was not terminated for any reason related to any protected concerted activity.

One gets the impression from reading the portions of Respondent's brief set out above that Respondent is taking the position that Craig was or could have been terminated for cause. With respect to the November meeting in Cochran's office, no disciplinary action was taken against Mary Craig at the time. And when Cochran recited the reasons Jeffers gave on December 15, 1997, for terminating Mary Craig this was not included among the reasons given. The record does not support Respondent's assertion that Craig was terminated the next time she reported for work after her December 10, 1997 conversation with Jeffers. According to General Counsel's Exhibit 4, Mary Craig was scheduled to work on December 11 and 12, 1997. She had her conversation with Donna McKenzie at Respondent's facility on December 11, 1997. Mary Craig testified that she worked 2 (possibly 3) days after this conversation. Her testimony is credited. Additionally, Cochran did not indicate that this was one of the reasons cited by Jeffers on December 15, 1997.

The Board, in *Independent Stations Co.*, supra, which cites *Meyers Industries*, 268 NLRB 493 (1984), indicated as follows:

In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority

of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. [Footnote omitted.]

As described above, Mary Craig engaged in protected concerted activity with respect to April Craig, Rigby, Jackson, Paula, and McKenzie. Without question, Respondent knew about the concerted nature of Mary Craig's activities with respect to April Craig, Rigby, and Jackson. Indeed, Jeffers, in effect, told April Craig that she, Jeffers, did not want Mary Craig to continue her concerted activity with respect to April Craig. The director of nursing did not testify at the hearing herein to deny that he heard what Mary Craig said in her conversation with McKenzie on Thursday December 11, 1997. Mary Craig's testimony that she said it loud enough for the director of nursing to hear is credited. On Monday, December 15, 1997, when Mary Craig was discharged Respondent's management was well aware of Mary Craig's protected concerted activity. Mary Craig was an outstanding employee. She did not have any reprimands or warnings in her personnel file. The fact that she did not get along with Monson is understandable based on the record made herein. Other employees found Monson's attitude and performance wanting. Complaints about Monson had been made to Jeffers so management knew about his shortcomings. Cochran conceded that she spoke to Jeffers about Monson. The General Counsel has established that the Respondent's termination of Mary Craig was motivated by her protected concerted activity.

Because the General Counsel has established unlawful motivation, the burden shifts to the Respondent to demonstrate that it would have terminated Mary Craig even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation, *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). As noted above, Respondent takes the position that it is not required to offer a reason for the termination of Mary Craig. This position might have merit if there was no question of unlawful motivation for the termination. But here the General Counsel has demonstrated that Respondent's termination of Mary Craig was motivated by her protected concerted activity. The General Counsel has shown animus against the protected concerted activities of Mary Craig and a desire on the part of Respondent to discourage employees from engaging in such activity were motivating factors in the termination of Mary Craig. Consequently, by law, the burden has shifted to Respondent to demonstrate that it would have terminated Mary Craig even in the absence of the protected conduct. Respondent has not rebutted the General Counsel's showing. Respondent has not shown that it would have terminated Mary Craig in the absence of her protected concerted activities. What Jeffers allegedly told Cochran on December 15, 1997, does not withstand scrutiny. There was no investigation, and what Jeffers allegedly said, when examined in the light of the record made herein, would not justify terminating someone. As alleged in the complaint, Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Main Street Terrace Care Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By promulgating a rule prohibiting employees from discussing their wages among themselves to discourage employees from engaging in concerted activities, the Respondent violated Section 8(a)(1) of the Act.

3. By terminating Mary Craig because she engaged in protected concerted activity and in order to discourage other employees from engaging in such activity, the Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in and is engaging in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that the Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Having found that the Respondent unlawfully discharged Mary Craig, it will be recommended that the Respondent be ordered to reinstate her to her former position and make her whole for any loss of earnings and benefits she may have suffered as a result of the Respondent's unlawful conduct, in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On the foregoing findings of fact, conclusions of law, and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, Main Street Terrace Care Center, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining a rule prohibiting employees from discussing their wages among themselves to discourage employees from engaging in concerted activities.

(b) Discharging its employee Mary Craig because she engaged in protected concerted activities and to discourage employees from engaging in these activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Mary Craig full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Mary Craig whole for any loss of earnings and other benefits suffered as a result of the discrimination against

her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Mary Craig in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Philadelphia, Pennsylvania facility copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized agent, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 5, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT promulgate and maintain a rule prohibiting you from discussing your wages among yourselves to discourage you from engaging in concerted activities.

WE WILL NOT discharge any employee because they engage in protected concerted activities and we will not discourage employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act. Section 7 of the Act gives employees these rights:

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL within 14 days from the date of the Board's Order, offer Mary Craig full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Mary Craig whole for any loss of earnings and other benefits suffered as a result of her discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Mary Craig, and WE WILL within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

MAIN STREET TERRACE CARE CENTER